

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1080

JAMES CLEVELAND (JIMMY) BURGETT,
PETITIONER

vs.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS

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Original Print

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County, Texas

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[fol. 1]

[Caption: Omitted in printing]

[fol. 2]

IN THE 8TH JUDICIAL DISTRICT COURT OF
HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

/ INDICTMENT—Filed April 7, 1965

IN THE NAME AND BY AUTHORITY OF
THE STATE OF TEXAS:

THE GRAND JURORS, for the County of Hunt, State aforesaid, duly organized as such at the January Term, A.D. 1965, of the District Court of the 8th Judicial District for said County, upon their oaths in said Court present that James Cleveland (Jimmy) Burgett, on or about the 15th day of April, A.D. 1964, and anterior to the presentment of this Indictment, in the County of Hunt, and State of Texas, did then and there unlawfully, with malice aforethought, cut Weldon E. Bradley with a knife and cut and stab at the throat of the said Weldon E. Bradley with said knife, with the intent then and there to murder the said Weldon E. Bradley;

And the Grand Jurors aforesaid do further present that prior to the commission of the aforesaid offense by the said James Cleveland (Jimmy) Burgett hereinbefore charged against him as set forth and alleged in the first paragraph of this Indictment, to-wit, on the 12th day of March, A.D. 1964, in the Criminal District Court No. 4 of Dallas County, Texas, in Cause No. E-4,825-K on the

docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of Jimmy Cleveland Burgett, was duly and legally convicted in said last-named court of a felony offense less than capital, to-wit, burglary with intent to commit theft, upon an Indictment then legally pending against him in the said last-named court and of which said last-named court then and there had jurisdiction, and said conviction last-mentioned was a final conviction and was a conviction for an offense committed by him the said James Cleveland (Jimmy) Burgett, prior to the commission of the offense hereinbefore charged against him as set forth and alleged in the first paragraph of this Indictment;

[fol. 3] And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the said James Cleveland (Jimmy) Burgett hereinbefore charged against him as set forth and alleged in the first and second paragraphs of this Indictment, to-wit, on the 17th day of June, A.D. 1961, in the Circuit Court of Maury County, Tennessee, in Cause No. 6,709 on the docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of James Burgett, was duly and legally convicted in said last-named court of a felony offense less than capital, to-wit, forgery, upon an Indictment then legally pending against him in said last-named court and of which said last-named court then and there had jurisdiction, and said conviction last-mentioned was a final conviction and was a conviction for an offense committed by him, the said James Cleveland (Jimmy) Burgett, prior to the commission and conviction of the offense hereinbefore charged against him as set forth and alleged in the second paragraph of this Indictment, and said conviction set forth and alleged in this paragraph of this Indictment was prior to the commission of the offense charged against him as set forth and alleged in the first paragraph of this Indictment;

And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the said James Cleveland (Jimmy) Burgett hereinbefore charged against him as set forth and alleged

in the first and second paragraphs of this Indictment, to-wit: on the 17th day of June, A.D. 1961, in the Circuit Court of Maury County, Tennessee, in Cause No. 6,710 on the docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of James Burgett, was duly and legally convicted in said last-named court of a felony offense less than capital, to-wit, forgery, upon an Indictment then legally pending against him in said last-named court and of which said last-named court then and there had jurisdiction; and said conviction last-mentioned was a final conviction; and was a conviction [fol. 4] for an offense committed by him, the said James Cleveland (Jimmy) Burgett, prior to the commission and conviction of the offense hereinbefore charged against him as set forth and alleged in the second paragraph of this Indictment, and said conviction set forth and alleged in this paragraph of this Indictment was prior to the commission of the offense charged against him as set forth and alleged in the first paragraph of this Indictment;

And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the said James Cleveland (Jimmy) Burgett hereinbefore charged against him as set forth and alleged in the first and second paragraphs of this Indictment, to-wit, on the 17th day of June, A.D. 1961, in the Circuit Court of Maury County, Tennessee, in Cause No. 6,711 on the docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of James Burgett, was duly and legally convicted in said last-named court of a felony offense less than capital, to-wit, forgery, upon an Indictment then legally pending against him in said last-named court and of which said last-named court then and there had jurisdiction, and said conviction last-mentioned was a final conviction and was a conviction for an offense committed by him, the said James Cleveland (Jimmy) Burgett, prior to the commission and conviction of the offense hereinbefore charged against him as set forth and alleged in the second paragraph of this Indictment, and said conviction set forth and alleged in this paragraph of this Indictment was prior to the commission of the offense charged against him as

set forth and alleged in the first paragraph of this Indictment;

against the peace and dignity of the State.

/s/ BRUCE PEEK
Foreman of the Grand Jury

NO. 9632. THE STATE OF TEXAS VS. JAMES CLEVELAND (JIMMY) BURGETT INDICTMENT. OFFENSE ASSAULT WITH MALICE AFORETHOUGHT WITH INTENT TO MURDER: REPETITION OF OFFENSE. /s/ CAMERON MCKINNEY, District Attorney.

TRUE BILL /s/ BRUCE PEEK, Foreman of Grand Jury.
FILED April 7, 1965. Richard Crowell, Clerk District Court, Hunt Co., Texas.

[fol. 5]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9,632

[Title Omitted]

STATE'S MOTION TO INSTRUCT DEFENDANT'S COUNSEL—
Filed April 29, 1965

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the State of Texas, by and through Cameron McKinney, the duly elected, qualified and acting District Attorney in and for the 8th Judicial District of Texas, and, for and in behalf of the said State of Texas, presents this motion in said cause as follows:

1.

That the subject of matter of the amount and quantum of punishment for the subsequent conviction of a felony

offense less than capital, to-wit, the felony offense of assault with malice aforethought with intent to murder of the felony offense of assault without malice aforethought with intent to murder, under the laws of the said State of Texas, is not a subject for the jury in such cases inasmuch as the punishment therein is fixed by law and not by the jury, that any knowledge by the members of the jury panel in such cases of the terms of such punishment for said named offenses could serve no legal or useful purpose but might tend to result in a revolt by such jury against the arbitrary penalty of the law for the commission of said named offenses, and that no party has a right to bring before such jury a subject or matter either of law or of fact for the purpose of causing them to so rebel against the law and inducing them to refuse to follow the same.

2.

That the defendant in this said cause, James Cleveland (Jimmy) Burgett, stands charged herein with the offenses [fol. 6] above-named, to-wit, the felony offenses of assault with malice aforethought with intent to murder and assault without malice aforethought with intent to murder, and that, insofar as these charges are concerned, this cause is brought and is to be tried under the habitual criminal law of the said State of Texas.

Wherefore, it is moved by the said State of Texas that counsel and attorney for said defendant herein be instructed not to refer in any manner, directly or indirectly, during the course of the trial of this said cause, within the presence or hearing of any member of the jury or jury panel herein, to the subject or matter of the amount or quantum of the punishment that said defendant would receive as a result of a verdict herein finding said defendant guilty of either the offense of assault with malice aforethought with intent to murder or assault without malice aforethought with intent to murder charged in and by and included within the first paragraph of the indictment herein and further finding that each and all of the allegations in the second paragraph of this indictment are true and further finding that each and all of the allega-

tions in any one of paragraphs three through five of the indictment herein are true, and that said defendant be likewise instructed, and to further instruct said counsel and attorney for said defendant and said defendant that if such testimony has been raised by the evidence, then, and in that event, to so inform the Court of such fact subrosa or out of the presence or hearing of any member of said jury or jury panel and to allow the Court to rule upon the admissibility of such evidence or testimony out of the presence and hearing of said jury panel.

Respectfully submitted. \

/s/ CAMERON MCKINNEY
District Attorney,
8th Judicial District of Texas
Greenville, Texas

[File Endorsement Omitted]

[fol. 9]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

DEFENDANT'S MOTION TO QUASH INDICTMENT—
Filed April 29, 1965

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the first count of indictment pending against him herein for the reason that

said count is wholly insufficient in law to charge an offense against the laws of the State of Texas.

II.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the second count of indictment pending herein for the reasons that same is not sufficiently definite to apprise this defendant as to what the state will attempt to prove under said count, it is unintelligible, it is vague and indefinite as to the time of commission of the offense, the basis of the conviction in cause No. E-4,825-K, does not allege such fact or facts as would show that the conviction in cause No. E-4,825-K is an offense of like character as alleged in count one and the allegations contained in said count two are wholly insufficient under the laws of the State of Texas to charge a repetition of offense of a previous conviction for the purpose of enhancement of the penalty that might be assessed against this defendant, in that no sentence is alleged which is necessary to establish a final conviction.

III.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the third count of indictment pending herein for the reasons that same are not sufficiently definite to apprise this defendant as to what the State will attempt to prove under said count, it is unintelligible, it is vague and indefinite as to the time [fol. 10] of commission of the offense, the basis of the conviction in cause No. 6,719, does not allege such fact or facts as would show that the conviction in cause No. 6,709 is an offense of like character as alleged in count one and the allegations contained in said count three are wholly insufficient under the laws of the State of Texas to charge a repetition of offense or a previous conviction for the purpose of enhancement of the penalty that might be assessed against this defendant in that no sentence is alleged which is necessary for a conviction to be final.

IV.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the fourth count of indictment pending herein for the reasons that same is not sufficiently definite to apprise this defendant as to what the State will attempt to prove under said count, it is unintelligible, it is vague and indefinite as to the time of commission of the offense, the basis of the conviction in cause No. 6,710, does not allege such fact or facts as would show that the conviction in cause No. 6,710 is an offense of like character as alleged in count one and the allegations contained in said count four are wholly insufficient under the laws of the State of Texas to charge a repetition of offense or a previous conviction for the purpose of enhancement of the penalty that might be assessed against this defendant in that no sentence is alleged which is necessary for a conviction to be final. Further, conviction on said count four is on the same day as that of count three in cause No. 6,709 and is wholly insufficient under the laws of the State of Texas for the purpose of enhancement of any penalty that might be assessed.

V.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the fifth count of indictment pending herein for the reasons that same is not sufficiently definite to apprise this defendant as to what the State will attempt to prove under said count, it is [fol. 11] unintelligible, it is vague and indefinite as to the time of commission of the offense, the basis of the conviction in cause No. 6,711, does not allege such fact or facts as would show that the conviction is cause No. 6,711 is an offense of like character as alleged in count one and the allegations contained in said count five are wholly insufficient under the laws of the State of Texas to charge a repetition of offense or a previous conviction for the purpose of enhancement of the penalty that might be assessed against this defendant in that no sentence is

alleged which is necessary for a conviction to be final. Further, conviction on said count five is on the same day as that of count three in cause No. 6,709 and is wholly insufficient under the laws of the State of Texas for the purpose of enhancement of any penalty that might be assessed.

WHEREFORE, premises considered, this defendant prays that each and all of the above and foregoing exceptions to and motions to quash the various counts of the indictment in this cause be each and all singularly and/or collectively sustained.

Respectfully submitted.

FLOYD A. HUNTER
First Greenville National
Bank Bldg.
Greenville, Texas
Attorney for Defendant

[File Endorsement Omitted]

[fol. 12]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

DEFENDANT'S MOTION FOR INSTRUCTIVE VERDICT—
Filed April 29, 1965

TO THE SAID HONORABLE JUDGE:

Now comes the defendant in the above entitled cause, at the conclusion of the State's main case and after the State has rested its main case, and no evidence having been offered by the defendant, moves the Court for an instructed verdict of not guilty;

I.

Upon the grounds that the evidence introduced by the State upon this trial of the case is wholly insufficient to sustain a conviction against the defendant of the offense charged in the indictment.

By /s/ FLOYD A. HUNTER
Attorney for Defendant
FLOYD A. HUNTER
Greenville National Bank
Bldg.
Greenville, Texas

The above and foregoing motion was presented to me and the same is by me overruled, defendant except, signed and order filed among the papers in this case, this the 29th day of April, 1965.

/s/ FRANK WEAR, SR.
Judge of the District Court
Hunt County, Texas

[File Endorsement Omitted]

[fol. 14]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

COURT'S CHARGE—Filed April 29, 1965

LADIES AND GENTLEMEN OF THE JURY:

[fol. 18] However, you are further charged, if you do not so find, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of aggravated assault.

You are further charged that if from the evidence you believe beyond a reasonable doubt that the defendant is guilty of some grade of assault, but if you have a reasonable doubt whether the offense is simple assault or aggravated assault, then, you must give the defendant the benefit of the doubt and in such case, and if you find him guilty, it could not be of a higher grade of offense than simple assault.

You are further charged that the punishment for simple assault shall be by a fine only of not less than \$5.00 nor more than \$25.00.

Our Statutes provide that any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to testify shall not be taken as a circumstance against him, so in this case you are instructed that the fact that the defendant failed to testify in his own behalf herein, is not any evidence of his guilt, or even a circumstance tending to prove his guilt, and the jury, in their deliberations in the jury room, must not refer to, mention or discuss the failure of the defendant to so testify in this case, nor will you consider such failure to so testify for any purpose whatsoever.

You are further instructed that the State during the trial of this case offered evidence that might be considered

as tending to show the commission of other offenses prior to the 15th day of April, 1964, that all such evidence is withdrawn from you and you will not consider such evidence for any purpose whatsoever in arriving at your verdict. You should not mention or discuss in your deliberations such evidence or that portion of the indictment read to you attempting to charge such prior offenses.

You are further instructed that the indictment read to you is not evidence and shall not be considered by you as such.

[fol. 19]

[File Endorsement Omitted]

[fol. 20]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

JUDGMENT—Date April 29, 1965

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant James Cleveland (Jimmy) Burgett, appeared in person, in open Court, his counsel also being present, whereupon both parties announced ready for trial and the said Defendant James Cleveland (Jimmy) Burgett in open court, pleaded not guilty to the charge contained in the indictment herein, thereupon a jury of good and lawful men, to-wit: C.W. Cox and eleven others was duly selected, impaneled and sworn, who, having heard the indictment read, the Defendant's plea of not guilty there-

to, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of their verdict, and afterward was brought into open Court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

We the jury find the defendant guilty of *assault with intent to murder with malice aforethought* as charged in the Indictment and assess his punishment at ten years in the State Penitentiary.

/s/ C. W. Cox
Foreman

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant James Cleveland (Jimmy) Burgett is guilty of the offense of Assault with Malice aforethought with Intent to Murder; Repetition of Offense as found by the jury and that he be punished by confinement in the State Penitentiary for a term of not less than two (2) year nor more than Ten (10) years, and that the State of Texas do have and recover of the said Defendant James Cleveland (Jimmy) Burgett all costs in this prosecution expended, for which let execution issue; and that the said Defendant be remanded to jail to await the further orders of the Court herein.

[File Endorsement Omitted].

[fol. 22]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

[Title Omitted]

SENTENCE—June 2, 1965

This day this cause being again called, the State appeared by her District Attorney, and the Defendant James Cleveland (Jimmy) Burgett was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term. And thereupon the Defendant James Cleveland (Jimmy) Burgett, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon, the Court proceeded in the presence of the Defendant James Cleveland (Jimmy) Burgett to pronounce sentence against him as follows:

It is therefore pronounced and ordered by the Court, that said judgment be carried into execution in the manner prescribed by law, and that the Defendant James Cleveland (Jimmy) Burgett who has been adjudged to be guilty of Assault with malice aforethought with intent to Murder; Repetition of Offense and whose punishment has been adjudged at confinement in the penitentiary for a term of Ten (10) Years, be delivered by the Sheriff of Hunt County, Texas, immediately to the Director of Corrections or other person legally authorized to receive such convict, and the said James Cleveland (Jimmy) Burgett shall be confined in said penitentiaries for a term of not less than two (2) nor more than ten (10) years in accordance with the provisions of the law governing the penitentiaries and the Texas Department of Corrections. And the said James Cleveland (Jimmy) Burgett is remanded to jail until said Sheriff can obey the directions of this sentence. The Defendant, in open Court, having waived the ten days' time, and ask that sentence

be passed on him immediately, which was accordingly done.

FRANK WEAR, SR.
Judge

[fol. 23]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

JURY VERDICT—Filed April 29, 1965

We the jury find the defendant guilty of *assault with intent to murder with malice aforethought* as charged in the indictment and assess his punishment at ten years in the State *penetury*.

/s/ C. W. Cox
Foreman

[File Endorsement Omitted]

[fol. 24]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

MOTION FOR NEW TRIAL—Filed May 5, 1965
TO SAID HONORABLE COURT:

Now comes the defendant in the above cause, and files this, his motion for new trial therein, and as ground for same, says:

I.

Said verdict and judgment are contrary to the law, in that defendant was not present during the voir dire examination of the Jury Panel.

II.

The verdict rendered in said cause and the judgment entered thereon is not supported by the evidence in the case.

WHEREFORE, defendant moves and prays the Court that the verdict and judgment herein be set aside and held for naught, and that he be granted a new trial herein.

/s/ JAMES C. BURGETT
Defendant

SWORN TO AND SUBSCRIBED BEFORE ME, by
James Cleveland (Jimmy) Burgett this the 5 day of May,
1965.

/s/ HOMER WACASEY
Notary Public in and for
Hunt County, Texas

[SEAL]

[File Endorsement Omitted]

[fol. 25]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

AMENDED MOTION FOR NEW TRIAL—Filed May 13, 1965

TO SAID HONORABLE COURT:

Now comes the defendant in the above entitled and numbered cause, and with leave of the Court first had, filed this his amended motion for a new trial, in lieu of his original motion heretofore filed herein, and by the same moves the Court to set aside the verdict of the jury and the judgment of the Court rendered thereon, and to grant him a new trial for the following reasons, to wit:

I.

Because the Court erred in failing to have the defendant present for the voir dire examination of the jury panel, in that all of the jury panel were examined on another trial on Monday, April 19, 1965 except three, and this defendant herein was not afforded his right of personally examining said jury panel and at no time did he personally waive or forego this right even though his court appointed attorney did examine said jury panel on April 19, 1965, and in so far as the court appointed counsel was concerned may have waived further questioning of the panel; defendant herein did not and does not now waive but rather insists on his right to be present and to pass on the qualifications and desirability of the jurors in his trial, and relies on the first clause of subdivision 1 of Article 753 of the Code of Criminal Procedure of the State of Texas.

2.

Because the Court erred in overruling defendant's written motion to quash the indictment and in the alternative to quash those counts alleged for enhancement for lack of definiteness, clarity, vagueness, intelligibility and failure of the State of Texas to allege said counts so that defendant could establish their admissibility before they were read into the record in the presence of the jury; same reading into the record in the presence of the jury was prejudicial to defendant herein,

[fol. 26]

3.

Because the Court erred in overruling defendant's verbal motion to quash the indictment at the conclusion of the reading of the indictment because it's reading in the presence of the jury was prejudicial to defendant herein,

4.

Because the Court erred in overruling defendant's motion for a directed verdict of not guilty at the end of the State's main case and before the defendant had offered evidence in the case.

/s/ JAMES C. BURGETT
JAMES CLEVELAND (JIMMY)
BURGETT

SUBSCRIBED AND SWORN to before me this 13 day
of May, 1965.

/s/ LEROY BRIGMAN
Notary Public in and for
Hunt County, Texas

[SEAL]

[File Endorsement Omitted]

[fol. 27]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs:

JAMES CLEVELAND (JIMMY) BURGETT

ORDER OVERRULING MOTION FOR NEW TRIAL AND
NOTICE OF APPEAL—Filed June 2, 1965

On the 2nd day of June, 1965, came on to be heard the amended motion of the defendant, James Cleveland (Jimmy) Burgett, to set aside the verdict and judgment herein rendered, and to grant him a new trial of this cause; and the State being present in court by her District Attorney, and the defendant, James Cleveland (Jimmy) Burgett, being present in court in person and by his attorney, and the Court having heard the said amended motion, and the evidence thereon submitted, is of the opinion that the same should be refused.

It is, therefore, CONSIDERED, ORDERED AND ADJUDGED by the Court that the said amended motion for new trial herein be and the same is refused, and in all things overruled.

TO WHICH ACTION, RULING AND JUDGMENT of the Court the defendant James Cleveland (Jimmy) Burgett, then and there in open court excepted, and gave notice of appeal herein to the Court of Criminal Appeals of the State of Texas, which said notice is here now entered of record.

ENTERED, this the 2nd day of June, 1965.

/s/ FRANK WEAR, SR.
Judge of the District Court
of Hunt County, Texas

[File Endorsement Omitted]

[fol. 32]

[Clerk's Certificate to foregoing
transcript omitted in printing]

[fol. 33]

[File Endorsement Omitted]

[fol. 34]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

STATEMENT OF FACTS—April 29, 1965

Testimony and proceedings before the Honorable
Frank Wear, Sr., Judge of said court and a jury, in
Greenville, Hunt County, Texas, on Thursday, April 29th,
1965, beginning at 10:00 A. M.

APPEARANCES:

CAMERON MCKINNEY, ESQ.,
Greenville, Texas

PAUL BANNER, ESQ.,
Greenville, Texas

SMITH GILLEY, ESQ.,
Greenville, Texas

Attorneys for the State of Texas

FLOYD A. HUNTER, ESQ.,
Greenville, Texas

Attorney for the Defendant.

[fol. 35] MR. WELDON E. BRADLEY, A WITNESS FOR THE STATE, after first being sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

BY MR. McKINNEY:

* * * *

[fol. 36] Q Mr. Bradley, as reflected by the photographs, state whether or not the door now as it existed on April 15, 1964, the door that leads from the lobby into the north and south corridor of the jail, state whether or not that door opens toward the lobby?

A It does, sir.

Q Now stepping through that door and then going to the right down the east-west corridor toward the prisoner area which way does that door open?

A That opens toward the west into the corridor.

Q Toward the west and I believe towards the north wall doesn't it to your right?

A That is correct.

Q What was your age on April 15, 1964?

A 57.

Q What is your date of birth?

A November 2, 1907.

Q What was your height on that date?

A 5-8.

Q Five feet eight inches?

A Right.

Q I will ask you whether or not on that date you suffered from any defect of health?

A No I don't think so sir.

Q Mr. Bradley, on Wednesday April 15, 1964, shortly before the hour of 5 P. M. state whether or not you had [fol. 37] occasion to go to the prisoner area where James Cleveland Burgett, the defendant in this case was a prisoner?

A I did, sir.

Q What caused you to go to that prisoner area?

A He had called back there that he wanted to use the telephone.

Q Pursuant to that request, what did you do?

A I went back there to the cell and let him out to use the telephone.

Q Did you use the control box?

A I did, sir.

Q What did you do then after you opened the door?

A I brought Mr. Burgett out to the office area to use the telephone.

Q I will ask you whether or not he used the telephone?

A Yes sir he did.

Q And state what happened then.

A He made a call which I thought at that time was a local call, which I ascertained later was a long distance call and called somebody in Tenn.

Q State what happened next.

A Well he talked for a while there and he asked whoever he was talking to—

Q Don't go into his conversation right there, Mr. Bradley.

A He did call long distance.

[fol. 38] Q Did he complete his call?

A Yes sir.

Q What happened then?

A At that time after he completed the call, I went to put him back into his cell.

Q Describe now following the completion of the call, describe his movements and your movements in going back to the cell.

A Well he accompanied me back into the hallway into the cell area and then I asked him to stand to one side while I opened the door.

Q I will ask you whether or not any jail personnel or trustees in the jail accompanied you also?

A No sir, not at that time.

Q Continue.

A I did have a trusty down there who had taken another prisoner to be put upstairs.

Q You asked him to stand to one side?

A That is correct.

Q Did the defendant stand to one side?

A He did.

Q With reference to where you were standing at the control box, where was he standing?

A He was standing to my right.

Q All right, sir, what happened then?

[fol. 39] A I opened the door to the control box, tripped the level to open the door and when I did so he stepped behind me.

Q And what happened next?

A Well I saw his left hand coming around to my left and he had a knife in his hand and I immediately grabbed his left hand with my right hand in this manner, and I took my left hand and hit him in the stomach, knocking him up against the wall where I could get turned around.

Q Did you get turned around?

A Yes I did.

Q What happened then?

A Well there was a scuffle occurred there.

Q Would you please state what occurred during that scuffle.

A Well he was cutting at my throat three or four times with the knife of which I think he changed hands with.

Q Did you observe the knife?

A I have the knife in my possession now.

Q At that time did you observe it?

A Yes I did.

Q I believe you stated that he cut at your throat three or four times.

A That's correct.

Q State how he would swing at your throat.

A He was swinging like this.

[fol. 40] Q Would you describe the arc of those swings made by the defendant to the jury.

A Well he was standing in front of me then and he was just swinging in an arc like that.

Q I will ask you whether or not the blade of the knife you have described struck you?

A Yes, it did.

Q Where?

A Behind the left ear.

Q Describe the wound that it made.

A It made a wound about an inch to an inch and quarter long and about an eighth inch deep.

Q I will ask you how the knife avoided hitting you or striking you in the throat?

A That I couldn't say except that I was moving pretty fast and in that scuffle I lost my keys.

Q Would you estimate how close the blade of that knife in motion came to your juglar vein.

A I couldn't say how close but it could have been very close.

Q I will ask you whether or not the thrusts were right under your chin?

A From the left ear to under my chin, yes sir.

Q I will ask you whether or not you would jerk your head back when those thrusts came at you?

A I was moving very fast.

[fol. 41] Q I will ask you how that knife kept from hitting you in the throat, Mr. Bradley?

A That I couldn't say.

Q Can you attribute it to any fact other than the fact that you were jerking your head back from the thrusts?

A I was jerking my head back and I was moving from side to side and pushing and shoving.

Q What happened then?

A I lost my keys, I retreated down the hallway and pulled the grating door in the east-west corridor closed.

Q Is that the door that's pictured in State's Exhibit No. 2?

A That is correct.

Q You pulled it closed.

A Yes sir.

Q What happened then?

A Well he cut at my hands three or four times and tried to pull the door open.

Q State what if anything that you would do when he cut at your hands?

A I would turn it loose. I would pull the door, he would cut at my hands, I would turn the door loose and pull it open. I would grab it again and pull it shut.

Q How many times did he do this?

A At least three times.

[fol. 42] Q And what happened then?

A Well all the time I was hollering "jail break" "jail break" "jail break" trying to get some help from the trusties who were upstairs down there to help me.

Q And what happened next?

A Well about the time the trusties came down why I shoved the door open in Mr. Burgett's face and kicked him.

Q And what happened then?

A Well he retreated down the hall then, slid the knife down the hall.

Q At the time you kicked him state whether or not he still had possession of the knife in question?

A He did.

Q And what did he do when you kicked him?

A He just turned around and walked down the hall and he slid the knife down and said "I give up"/

Q And what happened then?

A One of the trusties picked the knife up and handed it to me.

Q I will ask you whether or not you saw the trusty pick the knife up?

A What trusty picked it up I couldn't say. It was a trusty picked it up.

Q I will ask you whether or not you saw him pick it up?

A It was a trusty picked the knife up, yes sir.

* * * *

[fol. 43]

* * * *

THE FOLLOWING TESTIMONY WAS GIVEN OUTSIDE THE PRESENCE AND HEARING OF THE JURY:

MR. CAMERON McKINNEY, A WITNESS FOR THE STATE, after first being sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION BY MR. BANNER:

[fol. 44]

Q I will ask you whether or not during the course of this interview that the defendant, James Cleveland (Jimmy) Burgett, the defendant in this case, whether during the course of that interview he signed the statement to which you have been referring?

[fol. 45] A After the same was typed he did sign it.

(STATE'S EXHIBIT A WAS MARKED)

Q I now hand you State's Exhibit A and ask that you examine same please.

A All right, sir.

Q Please state whether or not State's Exhibit A is a written statement about which you have been testifying?

A It is. Mr. Banner, with this one qualification. This is a signed carbon. The original went into evidence in another proceeding. This is a signed carbon and he did sign it in my presence and the same was prepared at the same time the original was by me typed.

DEFENDANT: We will object to the carbon being used as evidence in this case when the original is the proper evidence.

A The signatures are not carbon. The original signatures are on there.

COURT: Where is the original?

MR. McKINNEY: I don't know. You will have to ask Jimmy Hughes.

COURT: I will reserve my ruling on that objection.

Q Would you state whether or not in words and substance that which appears on this original duplicate is the same as that which appears on the original?

A It is exactly the same.

Q And I did ask you whether or not it bore the defendant's signature?

[fol. 46] A It does.

Q Please state whether or not you saw him affix his signature to the bottom of that statement?

A To this statement and to the original.

Q Please state whether or not you were present at all times during the course of this interview with the defendant?

A I was in the same room with him from the time the interview began when Mr. Clifton brought him in until the interview was concluded after he signed the statement.

Q So you state that you were present during the time in which State's Exhibit A was reduced to writing and at the time it was signed by the Defendant.

A Yes sir at all times.

Q Prior to the time the defendant signed the statement which is marked as State's Exhibit A please state whether or not you gave him any warning?

A I did.

Q What was the warning given to the defendant?

A When he first came into the office I asked him if he desired legal counsel, and told him he was entitled to legal counsel if he wanted it. Before he signed the statement I warned him that he did not have to make any statement at all and that any statement made by him might be used in evidence against him on his trial or trials for the offense or offenses concerning which such statement was by him made.

[fol. 47] Q And is that warning that you have just recited contained anywhere in State's Exhibit A?

A The warning as to silence is contained in the printed matter at the beginning of the statement, which was on there at the time the statement was prepared.

Q I will ask you whether or not prior to the time the defendant signed the statement which is State's Exhibit A, whether or not he was given an opportunity to read the same?

A He was.

Q And did he read the same?

A He did.

STATE: We offer it in evidence.

COURT: Do you have any other objection for the purpose of this hearing?

DEFENDANT: At this hearing. It doesn't go into the main trial at this time.

COURT: No sir.

DEFENDANT: Other than that they have had plenty of time to get the original paper.

COURT: Mr. McKinney, is this James Cleveland Burgett the original signature on this?

A I know that it is, but let me look, sir. It is, sir.

COURT: Is that your original signature as a witness?

A It is and it is the original signature of Mr. Clifton. Your Honor we prepare those things in duplicate and [fol. 48] often in triplicate and they sign all of the copies so as to make originals of them. It is done that way.

COURT: I am going to overrule your objection.

DEFENDANT EXCEPTED.

CROSS-EXAMINATION

BY MR. HUNTER:

Q Mr. McKinney, was Mr. Burgett under arrest at that time?

A He was.

Q He was in jail?

A He was in custody, yes sir.

Q And where did they find Mr. Burgett when they brought him down to you?

A Where did they what?

Q Where was he in the jail. There are various places of holding a man—what part of the jail did they find him in?

A I can't tell you.

Q You don't know whether he was in solitary confinement with restricted rations or not?

A I can't tell you, Mr. Hunter, to give a completely honest answer. First of all I didn't see him in solitary confinement. Secondly, I do not recollect whether I was even told. Thirdly, it is entirely possible that he might have been, due to the things that had transpired immediately before taking it. I can't tell you.

Q There was nothing preceding this signing other than [fol. 49] the warning of this man that this would be

used against him, there was no special persuasion to get this confession from Mr. Burgett?

A No sir.

Q None at all?

A No sir.

Q He just willingly signed it?

A Yes sir.

MR. HUNTER: I have no further questions.

COURT: Mr. Burgett, I want you to listen to this, you and your counsel too. In matters of this kind, you have a right to testify if you desire at this time at this hearing in the absence of the jury. The testimony that you give at the hearing on this motion before the court will not be read or used in any way against you on your jury trial. I am not talking about the statements in the confession because that's a matter to be decided later. If you elect to come to the stand and testify concerning the circumstances of the taking of your confession, or the matters immediately surrounding it or immediately before that, you are authorized under the law to do that and under the law it is my duty to see that that's not used against you before the jury and also that you will not be questioned about the offense for which you are on trial or cross-examined about it during this hearing. All you will be questioned about will be [fol. 50] matters in connection with your confession or incident from the time after the alleged offense up to the time you signed the alleged purported confession. With that information, I would like for you to confer with your counsel as to whether you would like to testify or not relative to the taking of the confession.

(DEFENDANT CONFERRED WITH HIS ATTORNEY)

JAMES CLEVELAND BURGETT, THE DEFENDANT, after first being sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(STILL OUTSIDE THE PRESENCE AND HEARING OF THE JURY)

Q For the record, will you state your name?

A James Cleveland Burgett.

Q You are charged with an offense on April 15, 1964 of assault with intent to murder. The state is introducing here a paper purporting to be a voluntary statement of yours. Will you read that statement or look at it please.

A (Witness reads)

DEFENDANT: Your Honor, we would like to lay some grounds for our contention that this is not voluntary and we will have to go a little bit before the incident itself to properly apprise the court of the situation.

COURT: I will permit you to do that unless you go into fields I don't expect you to. You will not open up to the state any matter other than something you question him about.

[fol. 51] Q How long had you been in jail in this place before this incident, this was on April 15th?

A Since January 6, 1964.

Q Had you at any time asked for counsel to be appointed to your help?

A To tell the truth I don't know. I can't remember that far back.

Q Now this incident happened on the evening of the 15th of April and you have heard the testimony that you went back to your cell. After you went back to your cell, what happened then, who was the next people you saw after you went back to your cell?

A You mean after I had used the phone?

Q Afterwards, after this incident was completed.

A After this occurred?

Q Yes.

A The sheriff.

Q That was Mr. Frank Lane.

A Frank Lane.

Q And who was with Mr. Lane?

A Well the sheriff was present and the colored trusty by the name of Goldy—that's all I remember right there, the sheriff and this colored trusty, Goldy.

Q What happened then?

A Well they come back there and called me out and [fol. 52] put me in a solitary confinement cell, what they call the sweat box.

Q They call it the sweat box?

A Well it is. You sweat in there.

Q And did they explain to you that you were required to make a statement in this?

A They didn't explain nothin' to me that night. Put me in the sweat box.

Q Kept you there until next morning?

A The next morning they took me out.

Q Did they feed you during that time?

A No.

Q Where did they take you to then?

A Down to Mr. McKinney's office.

Q How long were you in Mr. McKinney's office?

A I don't rightly know.

Q How long were you in there before they started faking this statement?

A I believe we was in there a little while and went to see this J.P., Justice of the Peace and he set a bond or something and they started back up on the elevator and asked me if I would give a statement at the time. I said "Yes I will give a statement" you know as much as I know about it" and took me back down there on the elevator, before I even got back up to the jail we went back to his office.

Q The question this court is trying to determine, did you voluntarily make that statement?

[fol. 53] A Well after reading this over and of course the signature looks something like mine but seems like there is a few items added in here that I did not quote to Mr. McKinney as he typed it down.

Q If that is your statement, did you read it before you signed it?

A I read a statement that I gave to Mr. McKinney.

Q The statement that you gave Mr. McKinney at that time, was it voluntary?

A Well I figured I had better give one because I was in the sweat box and afraid they might leave me there and I wanted out of there.

Q You were afraid, you were frightened.

A Yes.

Q Did you ask for counsel?

A I think I was shook up I didn't know what I was doing, I don't know whether I did or not.

Q Did you knowingly waive counsel?

A No not that I know of.

Q Did they threaten you in any way if you didn't sign this?

A You mean bodily harm or what?

Q Well bodily harm or anything. What inducement did they use, if any?

A Well I don't know that they just come out and threatened me like that but I was afraid that they would [fol. 54] just keep leaving me in that sweat box and I wanted out of there which they had done said I was going to have to do at least six days they knowed of, they never specified no definite amount of time. I did five of those days in that sweat box. They let me out the third day and that's pretty hard on you.

CROSS-EXAMINATION

BY MR. McKINNEY:

Q Jimmy, I believe you stated that you went in front of Judge Wacasey immediately prior to giving the statement?

A Prior means before?

Q Yes.

A I remember going in his office.

Q That was for the purpose of your being charged with the offense of assault with intent to murder on Mr. Bradley wasn't it?

A I remember you saying it was a charge for attempting to commit murder, I remember that.

Q Do you remember Judge Wacasey asking you if you wanted an examining trial?

A That I do not.

Q You don't remember his asking you that?

A No sir.

Q Do you remember Judge Wacasey asking you if you wanted a bond set?

A I remember that and I remember that I said,

[fol. 55] which I was ignorant about it I didn't know what I was doing or nothin' "I don't know whether I do or not" and he said "the state requires it" and you set the bond at \$2500.00.

Q That was a recommendation made on my part to the court wasn't it?

A I guess it was.

Q Was Mr. Clifton with us down there?

A Not in there with the judge I don't believe.

Q What officer was?

A I think it was just you and I walked in there before Mr. Wacasey.

Q Do you mean to tell me that I brought you out of the jail down to a magistrate's office, just me and you?

A No, Mr. Clifton come and got me out of the sweat box.

Q Where did he take you to?

A Down to your office.

Q And then did we leave there and go before a magistrate where you were charged?

A We went before a J. P. I don't know what about that other.

Q All right, Justice of the Peace, and that's Justice of the Peace, Homer Wacasey wasn't it?

A It was Mr. Wacasey.

Q Are you meaning to testify that Mr. Clifton, a deputy sheriff or some other officer did not accompany us down there?

[fol. 56] A To the best of my memory I don't remember him being in there where we was at.

Q Where was it?

A Somewhere in this courthouse.

Q Is it your testimony before this court now that at some time you were in front of Judge Wacasey with me and there was no officer present?

A I am sure he wasn't and you and I walked in there—that's when he asked me about a bond which I don't know about a bond—I figured I had done had time and all that, I couldn't see any sense myself in a bond and he said "well the state requires it" real fast and you said

you recommended it I guess that a bond be set and this bond was set as you recommended, it was \$2500.00.

Q But you don't believe there was an officer in there?

A I don't.

Q Now we left from there I believe you said,—well we were on the elevator going up to the fifth floor.

A That is correct.

Q Was Mr. Clifton in the elevator?

A That's right.

Q Was I on the elevator?

A You was on it.

Q Was it there I asked you if you wanted to make a statement about what happened?

[fol. 57] A That's correct.

Q And then we went to my office.

A Yeah we rode the elevator and went to your office.

Q Now from the time you signed that statement, from the time that Mr. Clifton came and got you out of the sweat box as you have testified until the time you signed that statement, did anybody threaten you?

A Not that I know of. I was in the sweat box so I couldn't talk to nobody. Mr. Clifton came and got me and I didn't know what he wanted with me.

Q Did anybody make any promise of any sort?

A They didn't promise to get me out of the sweat box or anything like that.

Q Did they make you any other sort of promises, Mr. Clifton or myself or any other person?

A I can't say—I don't believe you did, I will say that.

Q Jimmy as a matter of fact didn't you tell me when I asked you if you wanted to make a statement about it, said "Well I might as well go ahead and make one."

A I don't remember saying those words, no.

Q How long were you in my office?

A I don't know.

Q Did I almost immediately start typing after you went into my office?

A After we went back down on the elevator?

[fol. 58] Q Yes.

A You started typing I am pretty sure.

Q And while I would be typing wouldn't I ask you questions?

A Yes you asked me questions. Well you told me I will give you the statement about what I done and like that you know.

Q Well as a general rule you just didn't sit there and narrate that entire statement. Wasn't it in response to questions I asked you?

A I don't know—I couldn't say about it.

Q Wouldn't I ask you things like "what happened next?" and "What was done then?" and "What was said then" and questions of that sort?

A I guess you did.

Q Now Jimmy do you think this statement right here is unlike the original?

A I do.

Q You think it is unlike it.

A I sure do.

Q Now the original has been read into the record at another term of court hasn't it, at another trial, the one you signed?

A Concerning this I couldn't say.

Q Jimmy let me say this, we can call out of town and find the court reporter and see where the original is.

[fol. 59] (Consultation of the attorneys with the judge out of the hearing of the jury which was still out of the court room)

Q Were you surprised Jimmy at having gone to the sweat box?

A Surprised at going to the sweat box?

Q Um-huh on the date you testified to were you surprised at having gone to the sweat box?

A I figured they would put me there somewhere.

COURT: Gentlemen, let's proceed. I think we are wasting time. I am going to hold the admission inadmissible. In view of the State's admissions before the Court that the defendant prior to the taking of the confession was held in a sweat box, was not given any food, was not allowed to communicate with anybody but was in solitary confinement for that period until he was brought down to Mr. McKinney's office, the court rules that the confession will not be admitted before the jury.

AT THIS TIME THE JURY WAS BROUGHT BACK INTO THE COURT ROOM.

OFFERS IN EVIDENCE

STATE: The State of Texas offers into evidence its Exhibit 5, a certified copy of the judgment and commitment in Cause No. 6,711 styled The State of Tennessee vs. James Burgett, having been rendered on June 17, 1961 in the Circuit Court of Maury County, Tenn. under certificate of the Clerk of that court.

DEFENDANT: Defendant objects to that being introduced as evidence. If you will note on that judgment there, on the face of the judgment it says that this defendant was before that court without counsel. It does [fol. 60] not indicate that he waived any counsel. Under our Texas laws that would not be a felony.

(CONSULTATION AT THE JUDGE'S DESK WITH THE ATTORNEYS)

DEFENDANT: I further object. This violates the Defendant's constitutional rights under the 14th and 15th amendments.

COURT reserved his ruling until State gets all of these offered into evidence.

(State's Exhibit 6 was marked).

STATE: If it please the Court, the State would next offer into evidence a copy of the indictment in Cause No. 6711 styled State of Tenn. vs. James Burgett in the Circuit Court of Maury County, Tenn. a certified copy of the Judgment and Commitment in that cause, the finger prints, a set of finger print impressions of one James Cleveland Burgett and a photograph of a James Cleveland Burgett in one package all under the certificate of the Warden of the Tenn. State Penitentiary and the Secretary of State of the State of Tenn. as State's Exhibit No. 6.

DEFENDANT: We would make the same objection, Your Honor, to this that we made to the other instrument just presented to the court.

COURT: I will reserve ruling on this too.

(State's Exhibit 7 was marked).

MR. McKINNEY: At this time the State would offer into evidence the State's Exhibit No. 7, a certified copy of the indictment in Cause No. E-4825K styled The State of Texas vs. Jimmy Cleveland Bufgett in the Criminal District Court No. 4, Dallas County, Texas.

[fol. 61] DEFENDANT: We have no objection.

COURT: State's Exhibit No. 7 will be received at this time.

* * * * *

[fol. 62] MR. RICHARD CROWELL, CALLED BY THE STATE AS A WITNESS, after first being sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Q State your name.

A Richard Crowell.

Q Do you hold any official position in Hunt County, Texas?

A Yes I do.

Q And what is that position?

A District Clerk.

Q And how long have you served in that capacity?

A Since January 1, 1963.

Q You are of course literate and conversant with the English language, reading the same?

A Yes I am.

Q I hand you an item which has been marked State's Exhibit No. 8 and which purports to be a judgment and sentence in the Criminal District Court No. 4 of Dallas County, Texas. Would you please read that to the jury.

A "Certified copy of Judgment and Sentence, Jury waived.

[fol. 63]

* * * * *

[fol. 64] Q Mr. Crowell does State's Exhibit No. 8 contain an endorsement?

A No it does not.

Q I hand you now State's Exhibit No. 7. Would you please read that to the jury.

A (Read to the jury) (See Exhibit No. 7 preceding pages)

Q Does that instrument bear an endorsement?

A Yes it does.

Q What is the part endorsed thereon?

A

Q What is the style endorsed thereon?

A The State of Texas vs Jimmy Cleveland Burgett, a true bill for burglary. Signed Cecil M. Higginbotham, Foreman of the Grand Jury.

Q I will ask you whether State's Exhibit No. 7 bears a certificate?

A It does.

Q And would you read that certificate please sir.

A "The State of Texas, County of Dallas.

I Bill Shaw, Clerk of the Criminal District Court No. 4 of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original true bill in the case of The State of Texas vs. Jimmy Cleveland Burgett, now on file in my office.

Witness my official seal and signature at office in the City of Dallas, this 27th day of April, 1965.

Bill Shaw, Clerk of Criminal District Court No. 4 Dallas County, Texas.

Signed by Margaret Wood, Deputy."

(AFTER CONSULTATION OF ATTORNEYS WITH THE JUDGE AT THE JUDGE'S BENCH, THE JURY WAS EXCUSED FROM THE COURT ROOM AND THE FOLLOWING TESTIMONY WAS GIVEN OUT OF THE PRESENCE AND HEARING OF THE JURY.

MR. RICHARD CROWELL, HAVING PREVIOUSLY BEEN SWORN, TESTIFIED AS FOLLOWS:

BY MR. McKINNEY:

Q You are the same Richard Crowell that just testified?

A I am.

Q I will ask you whether or not you have examined the certified copy of the sentence which you just read, the same being State's—a part of State's Exhibit No. 8 in Cause No. E-4825-K styled The State of Texas vs Jimmy

Cleveland Burgett in the Criminal District Court No. 4 of Dallas County, Texas.

A Now what was your question?

Q Have you examined it?

A Yes I have.

Q You have it before you?

A Yes I do.

Q Would you look at that part of the sentence that deals with the punishment administered.

A Yes I am looking at it.

[fol. 66] Q All right, would you read it to us as you read it to the jury?

A "It is the order of the court that the said defendant who has been adjudged to be guilty of burglary as charged in the Indictment and whose punishment has been assessed by the Court at confinement in the penitentiary for three years be delivered by the sheriff of Dallas County, Texas immediately to the Superintendent of the Penitentiary of the State of Texas or other persons legally authorized to receive such convict and said defendant shall be confined in said penitentiary for not less than two nor more than three years in accordance with the provisions of the law governing penitentiaries of said state."

Q Now where you last read the words "3 years" is the word three there spelled out or is a numeral used?

A It's a numeral used.

Q Now I will ask you whether or not you see close to that 3, the numeral 3, an impression of another numeral 3?

A Yes sir I do.

Q Is it a light impression or dark impression?

A It is a light impression.

Q Is it to the left of the numeral 3 you read or to the right?

A To the left.

Q What is immediately to the left of the light impression?

[fol. 67] A The word "than".

Q Is the n right next to it or is there a space between them?

A It is right next to it.

Q The little letter n in than is right next to the light impression 3.

A Yes and I might add that the light impression is not on the same line with the other numeral No. 3 and is not in line with the word "than".

Q I will ask you whether or not you type?

A I do.

Q Is it a part of the performance of your duties as District Clerk of Hunt County, Texas?

A It is.

Q And for how long have you typed?

A About ten years approximately.

Q I will ask you whether or not in typing it is possible to make a strike of that sort through accident?

A It is.

Q If that figure had been purposely typed, that is the light figure had been purposely typed would it ordinarily have been on the same level with the 3 read to the jury?

A Ordinarily both numbers would have been three if the typewriter carriage had not been moved. It would have been on the same level.

[fol. 68] Q And for the dim 3 to be in the position as there is, you would have to move your typewriter—

A You would have to roll the carriage.

Q To get it in that position.

A Yes sir.

CROSS EXAMINATION

BY MR. HUNTER:

Q You say one of these 3's is dark and another one is heavy?

A No, one is dark and one is light.

Q Are there two threes there?

A Yes sir, there are.

Q Is there enough sequence that it would read 33?

A Well it didn't to me. The first time I read it I didn't even notice the other 3 until it was called to the attention of the Court.

Q Is this a whole typewriter space above or below or is it just a fraction off?

A No it's just off a fraction. It wouldn't be off even a half space, not even a quarter space.

Q Now this is a court sentence of a man, taking a part of his time, taking a span out of his life.

A Yes sir I understand.

Q Now if that court had wanted to and there had been an error there, they could have erased that couldn't they?

[fol. 69] A Yes sir.

Q Does it show any indication of an erasure?

A Yes sir it shows it was either corrected type or an erasure of some sort—it appears to me—I am just giving you my opinion because I don't know, but if you will notice that this is a photostatic copy and it will pick up the least little flaw and it may appear to the naked eye that that was completely erased and there is also on the right hand of this judgment a picture of a staple laying out there which I am sure is not a part of this judgment, but this picked it up anyway.

Q Well, but this is taking 33 years out of a man's life.

A Yes sir, if that's true, it would be.

DEFENDANT: Your Honor we submit that the judgment is a void judgment on its face.

COURT: Defendant's objection to State's Exhibit 5 is sustained. Defendant's motion to strike State's Exhibit 8 after it had been admitted is sustained. Defendant's objection to State's Exhibit 6 is overruled.

DEFENDANT" EXCEPTED.

AT THIS TIME THE JURY WAS BROUGHT BACK INTO THE COURT ROOM AND THE FOLLOWING TESTIMONY WAS GIVEN:

* * * *

[fol. 70]

[Reporter's Certificate to foregoing transcript omitted in printing]

[fol. 71]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT No. 5 (Not admitted in evidence)

Ordered that he be remanded to Jail subject to the orders of the Warden of the State Penitentiary.

State of Tennessee

vs

James Burgett

No. 6711

Came the Assistant Attorney-General for the State and the Defendant in proper person and without Counsel. The Defendant being charged and arraigned hereon pleads guilty to a charge of Forgery. Thereupon a Jury of good and lawful men, Citizens of Maury County, Tennessee was duly elected and impaneled, to-wit: Charlie Hood, B. S. Jackson, Elbert Elmm, Joe Scannella, W. R. Greenfield, Clarence Dodd, English Gibson, Richard Lindsey, Mack Hardison, F. A. Connelly, H. B. Littejohn and C. B. Dodson who were charged and sworn in all things to well and truly try the issues joined between the State of Tennessee as the Plaintiff and James Burgett as the Defendant; upon a plea of guilty to a charge of Forgery and a true verdict render according to the law and the evidence.

Without leaving the Jury Box and upon the recommendation of the Assistant Attorney-General, the Jurors aforesaid upon their oaths aforesaid, did say, "We, the Jury, find the Defendant guilty as charged and recommend that his punishment be fixed at nor more than three years in the State Penitentiary."

Whereupon it is ordered by the Court that the Defendant [fol. 72] be confined at hard labor in the State Penitentiary for a period of not less than three nor more than three years and that he pay all the costs of this cause

for which execution may issue. It is further ordered that the sentence in this case run concurrently with the sentence in Case No. 6709.

Ordered that he be remanded to Jail subject to the orders of the Warden of the State Penitentiary.

SS: JOE M. INGRAM, Judge

STATE OF TENNESSEE, MAURY COUNTY

I, the undersigned Clerk, do hereby certify that this is a true and correct copy of the original of this instrument filed this 20 day of Nov. 1964.

/s/ E. B. RICHARDSON,
Circuit Court Clerk CP"

[fol. 73]

IN THE 8th JUDICIAL DISTRICT COURT OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT 6

STATE OF TENNESSEE)

) SS.

COUNTY OF DAVIDSON)

I, Henry M. Heer, hereby certify:

That I am the Warden of the Tennessee State Penitentiary a penal institution of the State of Tennessee, situate in the County and State aforesaid; that in my legal custody as such officer are the original files and records of persons heretofore committed to said penal institution; that the

(1) Photograph, (2) Fingerprint record and (3) Commitment attached hereto are copies of the original records of James Burgett #55089 a person heretofore committed to said penal institution and who served a term of im-

IN WITNESS WHEREOF, I have hereunto set my
hand this 25th day of March, A. D. 1965.

/s/ HENRY M. HEER,
Warden.

STATE OF TENNESSEE)) SS.
COUNTY OF DAVIDSON)

I, Joe C. Carr, Secretary of State of the State of Tennessee do hereby certify that Henry M. Heer, whose name is subscribed to the above Certificate, was at the date [fol. 74] thereof, and is now, the Warden of the Tennessee State Penitentiary, and is the Legal Keeper and the officer having the legal custody of the original records of said Tennessee State Penitentiary; that the said Certificate is in due form; and that the signature subscribed thereto is his genuine signature.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of the State of Tennessee this 25 day of March, A. D. 1965.

/s/ JOE C. CARR

Secretary of State of the State of Tennessee.

(SEAL ATTACHED).

STATE OF TENNESSEE, MAURY COUNTY

Be it remembered, that at a regular term of the Circuit Court for Maury County, State of Tennessee, began and held at the courthouse in the city of Columbia, the same being the 4th Monday in May, 1961, present and presid-

ing the Hon. Joe M. Ingram, Judge, etc., following which, after said term had continued until the following date is shown, the following proceedings were had and entered of record, to-wit:

Minutes of 17 day of June, 1961, of said term.

STATE OF TENNESSEE)	No. 6711 Indictment for
VS)	Forgery
JAMES BURGETT)	Guilty of Forgery.

Came the Attorney General on the part of the State, [fol. 75] and the defendant in proper person, who being arraigned at the bar of the Court, and charged on the bill of indictment, pleads guilty to the same (and for his trial puts himself upon the country, and the Attorney General doth the like), when to try the issue thus joined between the State of Tennessee and the defendant James Burgett came a jury of good and lawful men, who had been duly elected, tried and sworn to well and truly try said issue of facts joined between the State of Tennessee and said defendant James Burgett, and fix the punishment of said defendant; said jury being composed of the following, to-wit:

Charlie Hood
B. S. Jackson
Elbert Elmm
Joe Seannella
W. R. Greenfield
Clarence Dodd

English Gibson
Richard Lindsey
Mack Hardison
F. A. Connelly
H. B. Littlejohn
C. B. Dodson

After said jury had heard the evidence, argument of counsel and the charge of the Court, they retired to consider of their verdict, and they then returned into open court, and they said, according to their oath to make a true deliverance, and fix the punishment, according to their charge, that they find the defendant guilty of Forgery, and fix his punishment at 3 years in the Penitentiary House of this State. Whereupon the Court proceeded to pass sentence upon the defendant, according to the finding of said jury, that is the defendant shall serve an indeterminate sentence of not less than 3 years, nor more

[fol. 76] than 3 years in said Penitentiary House to run concurrently with #6709, that said defendant be rendered infamous, and incapable of giving evidence in any of the Courts of this State, or of exercising the privilege of the elective franchise; that he pay the cost of this prosecution, for which execution will issue.

STATE OF TENNESSEE
COUNTY OF MAURY

I, Evan B. Richardson, Clerk of the Circuit Court for said County and State, do hereby certify that the above is a true and perfect copy of the verdict, judgment and sentence in the case of the State of Tennessee vs James Burgett, as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, at office, in the city of Columbia, on this the 17 day of June, 1961.

/s/ EVAN B. RICHARDSON,
Clerk C. P. D.O.

STATE OF TENNESSEE, MAURY COUNTY

CIRCUIT COURT

MAY TERM, A. D. 1961

The Grand Jurors for the State of Tennessee, good and lawful men, duly elected, impaneled, sworn and charged to inquire for the body of the County of Maury, and State aforesaid, upon their oaths aforesaid, present: That James Burgett in said County and State, heretofore, to-wit, on the 1st day of May, 1961 unlawfully, feloniously [fol. 77] and fraudently did forge, alter or make, a certain instrument in writing, purporting to be a check which is as follows:

Columbia, Tenn. 5-1, 1961

THE MIDDLE TENNESSEE BANK

PAY TO THE ORDER OF Cathey's Grocery \$14.00
 \$14.00/100 Dollars
 For Groc. & Cash

DON DAVIS

And he the said James Burgett, did then and there, unlawfully, feloniously and fraudulently, by means of said forged instrument, intended to injure and defraud James Cathey, as manager, of Cathey's Grocery out of his property, and same was so fraudulently and feloniously done by said James Burgett to the prejudice of the rights of James Cathey, as manager of Cathey's Grocery, against the peace and dignity of the State of Tennessee.

SECOND COUNT:

And the Grand Jurors aforesaid, upon their oaths aforesaid, further present that on the day and date aforesaid, in the State and County aforesaid, the said James Burgett did unlawfully, feloniously and fraudulently offer to pass or transfer, or did pass or transfer, to James Cathey, as manager of Cathey's Grocery, a certain instrument in writing as follows:

Columbia, Tenn. 5-1, 1961

THE MIDDLE TENNESSEE BANK

PAY TO THE ORDER OF Cathey's Grocery \$14.00
 \$14.00/100 Dollars
 For Groc. & Cash

DON DAVIS

[fol. 78] when he the said James Burgett knew, then and there, that same was a forgery and same was done by him with the felonious intent to defraud the said

STATE OF TENNESSEE, MAURY COUNTY

OFFICE OF THE CLERK OF THE CIRCUIT
COURT FOR MAURY COUNTY.

I, Evan B. Richardson, Clerk of said County, do hereby certify that the foregoing is a true, perfect copy of the indictment in Case No. 6711 in re: State of Tenn. vs. James Burgett as appears of record now on file in my office.

Witness my hand and affix Seal of the Court, at office in Columbia, Tennessee, this 19 day of June, 1961.

/s/ EVAN B. RICHARDSON.

[fol. 79]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT 7

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas, and State of Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 4 of Dallas County, at the January Term, A. D. 1964, of said court, that one Jimmy Cleveland Burgett on or about the 13 day of December in the Year of our Lord One Thousand Nine Hundred and 63, in the County and State aforesaid, did by force, threats and fraud, break and enter a house there situate and occupied and controlled by J. R. Chism without the consent of the said J. R. Chism and with the intent then and there on the part of the said Jimmy Cleveland Burgett fraudulently to take from said house corporeal personal property therein being, and belonging to the said J. R. Chism from the possession of the said J. R. Chism without the consent of him, the said J. R. Chism and with the intent to deprive the said J. R. Chism the owner of said corporeal personal property of the value thereof, and with intent to appropriate the same to the use and benefit of him, the said Jimmy Cleveland Burgett.

Against the peace and dignity of the State

/s/ CECIL M. HIGGINBOTHAM,
Foreman of the Grand Jury

HENRY WADE
Criminal District Attorney of
Dallas County, Texas

[fol. 80] WITNESSES: J. R. Chism, Leon Thornberry,
C. A. Jones, H. W. Behringer, I. F. Van Cleave.

COMPANION CASES:

George W. Warren, Charles F. Warren

No. E 4825 K

THE STATE OF TEXAS

vs.

JIMMY CLEVELAND BURGETT

A TRUE BILL—BURGLARY

Cecil M. Higginbotham, Foreman of the Grand Jury
Filed Feb. 17, 3:23 P. M. '64, Bill Shaw, Dist. Clerk Dal-
las Co., Texas, s/s Matthews Deputy.

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, Bill Shaw, Clerk of the Criminal District Court No. 4 of Dallas County, Texas do hereby certify that the above and foregoing is a true and correct copy of the original TRUE BILL, in the case of the State of Texas vs Jimmy Cleveland Burgett now on file in my office.

Witness my official seal and signature, at office in the City of Dallas, this 27 day of April A. D. 1965

BILL SHAW, Clerk Criminal District Court, No. 4
Dallas County, Texas. By Margaret Wood Deputy."

[fol. 81]

STATE'S EXHIBIT A (Not Admitted)

VOLUNTARY STATEMENT OF
JAMES CLEVELAND BURGETT

Thursday Morning, April 16, A. D. 1964

I, James Cleveland Burgett, after having been first duly warned by Cameron McKinney, the person to whom the hereinafter set out statement is by me made, as follows: First, that I do not have to make any statement at all; Second, that any statement made by me may be used in evidence against me on my trial or trials for the offense or offenses concerning which this statement is made; do hereby make the following voluntary statement in writing:

My full name is James Cleveland Burgett, and I am a white male, and am 24 years of age having been born September 24, 1939, in Mt. Pleasant, Tennessee. My usual occupation is that of a construction worker. At the time of my last arrest, I was living in Dallas, Texas. I am 6'-0" tall and weigh about 165 pounds.

About a couple of weeks ago, I found this pocket knife on a bunk in the cell where I was in the Hunt County Jail. This is the same knife I cut at Mr. Bradley with yesterday afternoon while I was trying to get out of the jail. I had asked Mr. Bradley to let me use the jail telephone and he took me to the desk where the telephone was. I called my ex-wife, Wilma Fay Thornberry Burgett, in Franklin, Tennessee; this was a collect call to her. After this call, when Mr. Bradley was taking me back to my cell, this is when I pulled this knife out of my pocket. [fol. 82] I was behind him when I pulled this knife out there by the cell door. I pulled it out and opened it. Me and Mr. Bradley then had a scuffle. It was during this scuffle that I cut at him with this knife. This whole thing grew out of my intention to break out of jail here. I hollered at the rest to come on; everybody was wanting to break out. I knew I was doing a wrong thing when I

did what I did. Nobody has mistreated me at all since I have been in jail here. I just didn't want to go to the penitentiary for what I have done. I had rather be down there at Huntsville working than up here.

/s/ JAMES CLEVELAND BURGETT

Witnesses

Cameron McKinney,
District Attorney 8th Judicial District of Texas
Greenville, Texas
Fayt Clifton, Deputy Sheriff, Office of the Sheriff, Hunt
County, Greenville, Texas."

[fol. 83]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT NO. 8

CERTIFIED COPY OF JUDGMENT AND SENTENCE—
JURY WAIVED

CRIMINAL DISTRICT COURT No. 4, DALLAS COUNTY
January Term, 1964

March 12, 1964

No. E-4825-K

STATE OF TEXAS

vs.

JIMMY CLEVELAND BURGETT

THIS DAY this cause was called for trial and the State appeared by her Criminal District Attorney, and the defendant Jimmy Cleveland Burgett appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and

requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is guilty of the offense of Burglary, as charged in the indictment, as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 3 years, and that the State of Texas do have and recover of the said defendant, all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

SENTENCE

March 12, 1964

No. E-4825-K

STATE OF TEXAS

vs.

JIMMY CLEVELAND BURGETT

Burglary, as charged in the indictment.

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, Jimmy Cleveland Burgett was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him at a former time of this term; and thereupon the said Defendant, was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Burglary, as charged in the indictment and whose punishment has been assessed by the Court at confinement in the penitentiary for 3 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said penitentiaries, for not less than 2 nor more than 3 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin January 6, 1964.

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, Bill Shaw, Clerk of the Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and enter in the case of The State of Texas vs. Jimmy Cleveland Burgett, No. E-4825-K as the same appears of record in Book Pages 328 Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this day of April A. D. 1965.

By: /s/ Margaret Wood, Deputy

/s/ BILL SHAW
Clerk, Criminal District Court

[fol. 85]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

STATEMENT OF FACTS ON DEFENDANT'S MOTION
FOR NEW TRIAL—June 2, 1965.

Motion for new trial hearing before the Honorable Frank Wear, District Judge, 62nd Judicial District Court of Texas (sitting for the Honorable Joe N. Chapman, District Judge, 8th Judicial District of Texas), without a jury, in the district courtroom of the county courthouse, City of Greenville, Hunt County, Texas, on the 2nd day of June, 1965.

APPEARANCES:

MR. CAMERON MCKINNEY, District Attorney, 8th Judicial District of Texas, Greenville, Texas, and

MR. E. PAUL BANNER, County Attorney, in and for
Hunt County, Texas, Greenville, Texas,

For the State of Texas;

MR. FLOYD A. HUNTER, Greenville, Texas, by appointment,

For the Defendant;

[fol. 86] THE COURT: What says the state?

MR. MCKINNEY: State announces ready.

THE COURT: What say the defendant?

MR. HUNTER: Defendant announces ready.

THE COURT: Does the defendant wish to put on testimony?

MR. HUNTER: We do not.

MR. McKINNEY: State would like to put on a witness if the defendant doesn't want to.

THE COURT: All right. Go ahead.

E. PAUL BANNER,

called as a witness for the State, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. McKINNEY:

Q State your name?

A E. Paul Banner.

Q Do you hold any official position with Hunt County, Texas?

A I'm the County Attorney for Hunt County, Texas.

Q All right, sir. I will ask you whether or not you were serving in that capacity on Thursday, April the 29th, 1965?

[fol. 87] A I was.

Q And were you serving in that capacity on Monday, April the 26th, 1965?

A I was.

Q Mr. Banner, I wonder, state whether or not you assisted me as district attorney for the 8th Judicial District of Texas in representing the people of the State of Texas in Cause No. 9632, styled the State of Texas vs James Cleveland (Jimmy) Burgett, in the 8th Judicial District Court of Hunt County, Texas?

A Yes s'r, I did assist you.

Q I believe that case involved the prosecution for the offense of assault with malice aforethought with intent to murder?

A That's correct.

Q You were active in the prosecution of that case?

A Yes sir.

Q I will ask you whether or not you were present in court with me during each and every phase of the prosecution of that case, including the examination of the jury panel in the same?

A I was.

Q Mr. Banner, who conducted the bulk of the voir dire examination in that cause?

A I did.

[fol. 88] Q I will ask you whether or not you use a form in conducting a voir dire examination?

A I do.

Q I will ask you whether you addressed questions to certain of the jurors in the panel for the trial of that cause?

A Did I address specific questions—Yes sir.

Q What questions did you address to certain of the jurors, members of the jury panel selected for the trial of the case?

A I beg your pardon?

Q Members of the jury panel for the week, what questions did you address to certain of them?

A The jury panel was called the Monday of that week.

Q No, I'm talking about now some several jurors in the trial of this case, the Burgett case.

A All right. As I recall the voir dire examination in the Burgett case, I directed some general questions to the whole panel; there were three members who were on the jury panel that had not attended court earlier that week, so I asked specific questions in order to get the information that's required on this jury examination form that I used.

Q All right, sir. What specific questions did you ask of these three jurors on the panel who were not present on Monday during the same week?

[fol. 89] A Questions that I would have asked would have been whether they lived, that they had lived in Hunt County, or attempted to, what their names were, and their addresses, to determine if this is the same that appeared on the jury list, on the jury panel list, whether they were married or what their marital status, their occupation, who their employer was, and whether, if they were married, what their spouses occupation was, whether they had children and their ages, grandchildren, whether or not they had had prior jury service, and, if so,

what type, and whether or not they knew the defendant or the defendant's counsel, and whether or not they had any knowledge of this particular case being tried.

Q Now, on Thursday, April the 29th, 1965, during the trial of this cause here, what general questions did you address to the entire panel?

A As I recall I briefly discussed the nature of this type case, which was the assault with intent to murder with malice, explained the burden of proof that the law places on the State of Texas, I talked about the presumption of innocence on the part of the defendant, I talked about the right of the defendant not to testify if he chose not to, and its legal effect.

Q Did you explain to the entire jury panel what the court's charge was and its purpose?..

[fol. 90] A I believe I did, and I think, in fact I'm sure I also mentioned that the indictment of course would be no evidence, and I asked them whether or not generally there would be anything that would prevent them from being a fair and impartial juror.

Q I will ask you whether or not you asked the entire panel if each of them would be willing to follow the court's charge in the trial of the cause if they were selected as jurors?

A I did and each of them answered in the affirmative.

Q I will ask you whether or not you asked the entire panel whether each and every one of them had read or heard about any of the facts in the case?

A That is correct, I asked them if they had any outside knowledge and all of them said they did not.

Q I will ask you whether or not you asked the entire panel if any of them knew the defendant?

A I did.

Q Did any of them know the defendant?

A They did not.

Q Mr. Banner, were you present in court when the state and the defendant announced ready for trial?

A I was.

Q Just a moment, announced ready for trial in Cause 9632, styled the State of Texas vs James Cleveland (Jim-

[fol. 91] my) Burgett, in the 8th Judicial District Court of Hunt County, Texas, on Thursday, April 29th, 1965?

A Yes sir.

Q I will ask you whether you recognize the defendant at whom I'm pointing across the counsel table from me at this time?

A I do recognize him.

Q I will ask you at that time when the announcement of trial was made whether or not he was present in court?

A He was.

Q Mr. Banner, I will ask you whether or not this defendant was present during the entire examination of the jury pane called for the trial of this cause?

A Yes sir, he was here at all times on the date of the trial, Thursday.

Q I will ask you whether or not this defendant James Cleveland (Jimmy) Burgett was present in court when the State and when the defendant handed its jury list indicating its pre-emptory challenges to the clerk of this court?

A Yes sir.

Q I will ask you whether or not this defendant James Cleveland (Jimmy) Burgett was present on Thursday, April 29th, 1965, during every phase of the trial of this cause?

[fol. 92] A Yes sir, he was present.

Q Was he present when the jury rendered its verdict?

A He was.

Q Was he present during the entirety of the argument?

A He was.

Q Was he present during the entirety of the testimony in the case?

A He was.

Q All right, sir. I will ask you whether or not anyone at any time prevented him from asking the jury panel called for the trial of this case any questions?

A No sir, nobody prevented him from doing so; as I recall I believe the defendant had both a pencil and some paper and made notes and from time to time consulted with his attorney, if I remember right he did this.

Q I will ask you who represented this defendant James Cleveland (Jimmy) Burgett during the trial of this cause we are discussing?

A Mr. Floyd A. Hunter, attorney, of Greenville, Texas.

Q All right, sir. Was he present at all times during the examination of the jury panel?

A Yes sir, he was.

Q Was he present during every phase of the trial on that date?

A Yes sir, he was.

[fol. 93] Q I will ask you whether or not he was afforded an opportunity to question the jury panel?

A Yes sir, he was.

Q I will ask you whether or not he did address questions to the panel?

A Yes sir.

Q I will ask you whether or not he addressed specific questions to members of the jury panel?

A Yes sir, he did.

Q Mr. Banner, when were you licensed to practice law?

A In December of 1962.

Q That was by the Supreme Court of the State of Texas?

A That is correct.

Q Have you practiced law continually since that time in Greenville, Texas?

A Yes sir, I have.

Q You have engaged in the private practice of law?

A Yes sir.

Q Prior to becoming county attorney of Hunt County, Texas, did you engage in the trial of criminal cases?

A Yes sir, I did.

Q When did you become county attorney of Hunt County, Texas?

[fol. 94] A January the 1st, 1965.

Q Have you engaged in the trial of criminal cases since that time?

A Yes sir.

Q I will ask you how long you have known Mr. Floyd A. Hunter, the defendant's counsel in this cause?

A I believe that I have known Mr. Hunter a number of years; the first professional acquaintanceship with him was about two or two and a half years ago I believe as one attorney to another, but I have known Mr. Hunter longer than that.

Q I will ask you whether or not you have ever during your practice of law discussed legal matters with him?

A Yes sir, I have.

Q Have you discussed the law with him?

A Yes sir.

Q Have you seen him engage in the trial of cases in court?

A Yes sir.

Q Have you observed him in the trial of criminal cases in court?

A Yes sir.

Q Have you ever observed him in the handling and trial of civil cases in the courts of this county?

A I do not believe that I have seen him in a civil [fol. 95] case.

Q I will ask you whether or not in your opinion he is a competent practicing attorney?

A In my opinion, yes sir, he is.

Q Mr. Banner, I will ask you whether you were active in the prosecution of Cause No. 9634, styled the State of Texas vs Joe Edwards, which was tried in the 8th Judicial District Court of Hunt County, Texas, on Monday, April the 26th, 1965?

A Yes sir, I was active in that case.

Q All right, sir. I will ask you who represented the defendant in that cause?

A Mr. Floyd Hunter represented the defendant, as did J. O. Faires, an attorney of Commerce, Texas, represented Joe Edwards, the two served in Joe Edwards' case.

Q I will ask you whether or not in that case the State of Texas vs Joe Edwards, tried in this court or begun in this court on Monday, April the 26th, 1965, whether or not you conducted the bulk of the voir dire examination of the jury panel called for the week of Monday, April the 26th, 1965, for the trial of cases in the 8th Judicial District Court of Hunt County, Texas?

A Yes sir, I did.

Q I will ask you whether counsel for the defendant in that cause, Joe Edwards, examined each and every member of the jury panel in that cause?

A Yes sir, in the Joe Edwards case Mr. Faires did most of the questioning in the voir dire, but each member of the panel was specifically asked questions.

Q I will ask you whether or not Mr. Floyd A. Hunter was present in court during that voir dire examination by Mr. James O. Faires?

A He was.

Q I will ask you whether or not during that voir dire examination Mr. Hunter would be at Mr. Faires' elbow taking notes?

A He was, yes sir.

Q I will ask you whether or not after the jury was selected for the trial of cause No. 9634, The State of Texas vs Joe Edwards, the balance of the jury panel was told by the Court to return to this court on Thursday, April the 29th, 1965, at 9:30 a.m.?

A That's right.

Q And I believe you have stated that on Thursday, April the 29th, 1965, the panel did return but there were three additional members that were not examined by defendant's counsel and by states' counsel on Monday, April 26th, 1965?

A That's correct.

Q And I believe you stated that Mr. Hunter did examine these three jurors individually?

A Yes sir; as I recall Mr. Hunter examined the panel collectively too.

CROSS EXAMINATION

BY MR. HUNTER:

Q Mr. Banner, was Mr. James Cleveland Burgett present on Monday, April the 26th, 1965, while you and Mr. Faires conducted the voir dire of that jury panel?

A No sir.

THE COURT: Mr. Banner, on Monday, April 26, 1965, the first case called for trial was No. — was the first case called for trial No. 9634, The State of Texas vs Joe Edwards?

THE WITNESS: Yes sir.

THE COURT: Did the State announce ready in that case when it was called?

THE WITNESS: Yes sir.

THE COURT: Did the defendant announce ready in that case when it was called?

THE WITNESS: Yes sir; I believe the defendant had some preliminary motions, but subject to those motions he announced ready.

THE COURT: Was the case No. 9632, The State of Texas vs. James Cleveland (Jimmy) Burgett called on Monday, April the 26th, 1965, or was it called on April [fol. 98] the 29th, 1965?

THE WITNESS: It was called on Thursday; I believe those dates you said are correct, Edwards case was called Monday and Burgett case was called Thursday.

THE COURT: And no other cases were called on Monday other than the Edwards Case?

THE WITNESS: I do not believe there were.

THE COURT: Was James Cleveland (Jimmy) Burgett present when his case was called for trial the first time on Thursday, April the 29th?

THE WITNESS: Yes sir, he was present.

THE COURT: Was he present throughout the trial?

THE WITNESS: Yes sir.

THE COURT: Did the court or the state in any way interfere with the examination of the jury panel by Mr. Hunter or by James Cleveland. (Jimmy) Burgett?

THE WITNESS: No sir, there was no interference whatsoever, the only time the State raised any objection at all or said anything was where the State objected to an improper question being posed to the panel by the attorney for the defendant; the objection was sustained by the Court, but then the examination by the defendant's counsel continued, but other than that the state raised no objection or did in no wise or did the court in no wise interfere with examination of the panel by the defendant's attorney.

THE COURT: Did the Court in any way place any time limit on the examination of the jury panel by the defendant's attorney?

THE WITNESS: No sir.

THE COURT: Now, on Monday in the trial of The State of Texas vs Joe Edwards, No. 9634, did the clerk after announcements of ready in open court in the presence of that defendant, his attorneys and states attorneys place the names of the jurors on separate sheets of paper in a box and then draw them out and type them in the order in which they were drawn before submitting the list to be examined to the attorneys?

THE WITNESS: Yes sir, the panel was shifted in the manner you have said.

THE COURT: Was a new drawing made on Thursday of that week after James Cleveland (Jimmy) Burgett and his attorney had announced ready?

THE WITNESS: Yes sir, the panel was reshuffled.

THE COURT: And redrawn?

THE WITNESS: Yes sir.

THE COURT: And new lists prepared?

THE WITNESS: Yes sir.

THE COURT: Was James Cleveland (Jimmy) Burgett present during that procedure also?

[fol. 100] THE WITNESS: Yes sir, he was.

THE COURT: And his attorney?

THE WITNESS: Yes sir.

REDIRECT EXAMINATION

BY MR. McKINNEY:

Q I have one or two more questions. Mr. Banner, taking you back to Thursday, April the 29th, 1965, to the trial of Cause No. 9632, The State of Texas vs James Cleveland (Jimmy) Burgett, following your voir dire examination of the jury panel in that case, I will ask you whether I as district attorney addressed several questions to the entire jury panel?

A You did.

Q I will ask you whether or not I propounded the question in the presence of this defendant and his counsel to the jury panel selected for the trial, selected for that week and for the trial of that case, whether or not if it developed during the trial of the case that they might have read or heard something about the facts in the case,

if they could completely set it aside what they might have read or heard and give the defendant a fair and impartial trial?

A Yes sir, You asked that question.

Q Did I ask them with reference to that question if they would consider only the evidence that came to them [fol. 101] from the witness stand in the cause from the trial of the case?

A Yes sir, you asked that question.

Q I will ask you whether or not I addressed to this jury panel before the jury for the trial of the case was selected, if there was any reason why any member of that jury panel could not give this defendant a fair and impartial trial?

A Yes sir.

Q And was there any response to the question?

A The last three questions that you have just been asking me about, in each case the panel answered your questions in the affirmative, that they could give the defendant a fair trial, and the answer to the other questions also.

MR. HUNTER: I have no questions.

MR. McKINNEY: State rests.

MR. HUNTER: Defendant rests.

MR. McKINNEY: State closes.

MR. HUNTER: Defendant closes.

THE COURT: I will overrule the motion.

MR. HUNTER: Note our exception.

* * * *

[fol. 102]

AGREEMENT

It is hereby agreed by and between counsel for the the State and counsel for the Defendant that the above and foregoing Statement of Facts is true and correct.

/s/ Cameron McKinney
Counsel for the State of Texas

/s/ Floyd A. Hunter
Counsel for the Defendant

* * * *

[Reporter's Certificate Omitted in printing]

[fol. 104]

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

—Appeal from Hunt County

No. 38,860

JAMES CLEVELAND (JIMMY) BURGETT, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

OPINION—December 15, 1965

The offense is assault with intent to murder; the punishment, ten years.

The state's evidence shows that the prosecuting witness, Weldon E. Bradley, was a deputy sheriff in charge of the jail in Hunt County. Appellant was a prisoner and inmate in the jail.

Bradley testified that on the day in question appellant called him around 5 p.m. and said that he wanted to use the telephone. Thereupon, the witness went to appellant's cell and brought him out to the office area, where he used the telephone. After the call was completed, Bradley started back to the cell with appellant. When he stopped at a control box, appellant attacked him with a knife and a scuffle ensued between them. In describing the assault committed upon him by appellant, Officer Bradley testified as follows:

"Well he was cutting at my throat three or four times with the knife * * *

"He was swinging like this.

"* * * he was standing in front of me then and he was just swinging in an arc like that."

He further stated that the knife was traveling at a fast rate of speed when being swung at his throat and that he was in fear of his life, and also that appellant's thrusts with the knife were from the witness's left ear to under his chin and that he received a wound behind

the left ear about $1\frac{1}{4}$ inches long and $\frac{1}{8}$ inch deep. The officer further testified that before appellant was subdued he "slid the knife down and said, 'I give up.'" The knife was then recovered by a trusty and was introduced in evidence at the trial as state's exhibit #4. The knife, as described in the testimony, was shown to have a blade [fol. 105] approximately $1\frac{3}{4}$ inches in length and sharp enough to cut a person.

Dr. James E. Nicholson, upon being called as a witness by the state, testified that there were certain vital organs in the neck of a human being, including the jugular vein, and, based upon a hypothetical question describing the assault made by appellant upon the officer, expressed the opinion that it was made with a means calculated to produce death. The doctor further testified that had such an arc with the knife as described been slightly deeper it could have produced death by severing the jugular vein.

Appellant did not testify but called his cell mate as a witness who gave no testimony which shed any light on the manner of the assault.

Appellant predicates his appeal upon eight points of error.

Points of error Nos. one through seven present appellant's contentions that the court erred in overruling his motion to quash certain paragraphs in the indictment alleging prior convictions for the purpose of enhancement, and in permitting the state to read such allegations to the jury. Complaint is also made to the admission in evidence, over appellant's objection, to certain records offered by the state in proof of some of the prior alleged convictions.

The record reflects that no action was taken by the court on appellant's motion to quash the enhancement allegations in the indictment. The record further shows that while the court permitted the state to offer proof as to some of them, the truth or falsity of the enhancement allegations was not submitted to the jury. The court submitted to the jury only the issue of appellant's guilt of the primary offense, and in the charge withdrew from the jury's consideration the evidence offered to prove the prior offenses and conviction and instructed the jury as follows:

"You should not mention or discuss in your deliberations such evidence or that portion of the indictment read to you in attempting to charge such prior offenses."

[fol. 106] There is no showing of bad faith on the part of the state in alleging or attempting to prove the prior convictions.

In view of such instructions by the court and no enhancement having been made as a result of the jury's verdict, no error is presented. *Butler v. State*, 271 S.W. 2d 658; *Thomas v. State*, 353 S.W. 2d 463.

Point of error No. 8 presents appellant's contention that the court erred in overruling his motion for new trial on the ground that he was not present during the voir dire examination of the jury panel on Monday before his case was called for trial on Thursday.

This is a matter which must be presented by a formal bill of exception, and in the absence thereof such contention is not properly before us for review. *Beard v. State*, 305 S.W. 2d 291; *Welch v. State*, 373 S.W. 2d 497. We observe, however, that the record shows that the jury panel reported on Monday, at which time a jury was selected to try another criminal case set for trial on that date. After the jury was selected, the balance of the panel was instructed to return for jury service on Thursday. On Thursday, the panel did return, together with three additional members who had not been examined on Monday. Thereupon, the jury panel was examined in the presence of appellant and the jury selected which served in the case. The record affirmatively reflects that appellant was present during all stages of the trial. If the contention was properly before us for review, no error would be presented.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered December 15, 1965)
Opinion approved by the court.

[fol. 107]

SUPREME COURT OF THE UNITED STATES

No. 56, Misc., October Term, 1966

JAMES CLEVELAND BURGETT, PETITIONER

v.

TEXAS

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS AND GRANTING PETITION FOR WRIT
OF CERTIORARI—February 20, 1967

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1080 and placed on the summary calendar.